IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.592 OF 1991

Shri Ramchandra Dhondiba Salunkhe
Residing at Bhade, Taluka Khandala
Dist. Satara .. Appellant.
Vs.
Shri Nanasaheb Dinkar Pisal
Residing at Bhade, Taluka Khandala
Dist. Satara .. Respondent.

Mr.Vivek V.Salunkhe i/b Mr.Prafulla Shah for the appellant.
Mr.R.R.Bhonsale for the respondent.

CORAM : D.B.BHOSALE, J.
DATED : 21ST FEBRUARY, 2007

ORAL JUDGMENT:

. This second appeal under section 100 of the Code of Civil Procedure is directed against concurrent judgments of the courts below by which a suit filed by the respondent-plaintiff for redemption of the mortgage stands decreed. The plaintiff is a owner of the land admeasuring 90R bearing Gat No.1023 situate at Bhade, Taluka Khandala (for short "the suit land"). In 1982, the plaintiff was in need of money to repay the loan obtained from the bank. He, therefore, borrowed Rs.10,000/- each from the defendant and one Shankar Pisal and by way of security executed a deed of mortgage dated 22.7.1982 in respect of the suit land. According to the plaintiff a market value of the suit land at the relevant time was Rs.40,000/- it

being an irrigated (Bagayat) land. Admittedly, there was a condition of reconveyance after five years in the document dated 22.7.1982. Accordingly, the plaintiff got one half portion of Gat No.1023 mortgaged to Shankar Pisal redeemed and since the appellant refused to reconvey the property he filed the instant suit. Both the courts below after having considered the contents of the document as also the evidence led by the parties have interpreted the said document of sale and held that the nature of suit transaction was mortgage and not out and out sale, as claimed by the defendants.

2. Mr.Salunke, learned counsel for the appellant raised only two contentions. Firstly, the courts below have wrongly relied upon the oral evidence led by the plaintiff as against the terms of the document of sale dated 22.7.1982 which is not permissible in law in view of section 91 of the Indian Evidence Act. Secondly, he submitted that from bare perusal of the document it is clear that the parties intended to execute sale deed and not the mortgage as alleged by the plaintiff. He did not raise any other contention.

3. I perused the observations made by the courts below and more particularly paragraph nos.8, 9 and 10 of the appellate court’s judgment, wherein it has considered the evidence led by the plaintiff and have

also considered the nature of the document. It is clear not only from the oral testimony of the witnesses examined by the plaintiff but even from the conduct of the parties that the plaintiff intended to execute the mortgage and not out and out sale. It is true under section 91 of the Evidence Act, oral evidence against the terms of contract is not permissible, but to this provision exception is made in section 92 which allows such oral evidence as provided for therein. It is well settled that a defence/plea that title has not passed on the execution of the sale deed can be raised to rebut the presumption under section 91 and the intention of the parties behind executing the document can be gathered from the recitals or by other attending circumstances. In short there is no prohibition against the court preferring oral evidence to documentary evidence. It is thus clear that from the evidence, oral or otherwise, if it is inconsistent with the recitals of the document, it is open for the court to infer that the contents of the document are rebutted. This is what exactly the courts below have done. The courts below having taken overall facts and circumstances into consideration, in my opinion, have rightly held that the document was not out and out sale and the nature of transaction was mortgage. I find no reason to interfere with the findings of fact and I find sufficient material on record to sustain those

findings. Moreover, if the document was out and out sale there was no reason for Shankar Pisal to reconvey the property on expiry of the period of five years as provided in the document. It is not denied that the plaintiff had not offerred the amount after five years to the defendant. In view thereof it cannot be said that the courts below relied only upon the oral testimony as against the terms of contract. Even the terms of contract also clearly indicate that it was not out and out sale as claimed by the defendant. The defendant himself admitted in the written statement that it was the document of conditional sale. I find absolutely no reason to interfere with the findings of fact as also interpretation made by the courts below of the document dated 22.7.1982. Considering that no substantial question of law, in my opinion, is involved in the instant second appeal and considering that there are concurrent findings of fact recorded by the courts below and as I find sufficient material on record to sustain those findings and considering extremely limited jurisdiction of this court to disturb the findings of fact, this appeal stands dismissed. However, there will be no orders as to costs.

(D.B.Bhosale, J.)